(1)

89-1809

NUMBER_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

H. VAUGHN TOWNSEND, M.D., ROGER D. ANDERSON, M.D., MICHAEL G. WADE, M.D., PATRICK W. HOLBERT, M.D., JAMES T. CAMPAGNA, M.D., DR. RALPH E. MAYBERRY, JACK A. PASQUALE, M.D., BRIAN A. BYRNE, M.D., on their own behalves and on behalf of all others similarly situated, and St. George's University School of Medicine and Ross University

Petitioners

Vs.

HENRY G. CRAMBLETT, M.D., PETER LANCIONE, M.D., LEONARD L. LOUSHIN, M.D., LUCY O. OXLEY, M.D., JOSEPH P. YUT, M.D., JOHN H. BUCHAN, D.P.M., WILLIAM H. JOHNSTON, DEIRDRE O'CONNOR, M.D., CAROL ROLFES, R.N., AND JOHN E. RAUCH, D.O.

Respondents

Vs.

and

OHIO STATE MEDICAL BOARD

Defendant

PETITION FOR WRIT OF CERTIORARI to the UNITED STATES COURT OF APPEALS for the SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Bernard Joseph Ferguson
Council of Record
7 Essex Drive
Westerly, RI 02891
(401) 596-6662

QUESTIONS PRESENTED

1) Before a citizen has a clearly established constitutional, or state statutory liberty or property right, must the highest State Court or the U.S. Circuit Court and/or the U.S. Supreme Court clearly establish that right?

2) When an State Board interprets a medical licensure statute so as to provide automatic approval of an applicants medical school as listed by the World Health Organization may that state board reinterpret the same statute to a more restrictive standard so as to deny a liberty right at a regular meeting without providing notice and an opportunity to be heard to those adversely affected?

3) When State law clearly requires Board policy or rule changes follow mandated

procedures before they become effective may the Court of Appeals authorize the implementation of informal standards in contradiction to said State law?

4) When a liberty right is denied because of a willful violation of a state statute outlining procedural due process does that constitute a due process violation under both the federal constitution and the state law?

5) When a licensure statute limits official discretion to a board's present interpretation of that statute, unless statutory mandated process for change is followed, is a liberty interest created?

6) When Defendants unlawfully adopted and implemented a policy in December of 1979 that violated Plaintiff's and the other

members of the certified class's rights and thereafter at successive monthly meetingscontinue to implement their policy so as to continue to deprive Plaintiff's and the members of the certified class (to the date of this document) is the Defendants responsibility for their continuous violation of Plaintiff's and members of their class, rights limited to the date the complaint was filed on May 1, 1984?

7) May the Court of Appeals find as a valid reason for the Board's unlawful more stringent licensure policy a statement in an earlier decision of a different case involving the same issue that standards for listing in subsequent directories were significantly relaxed when Defendants have not made such claim in the present case and further, have conceded on this record; "there is no distinction between the 1970 or later editions"?

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STATEMENT OF THE CASE

The system in Ohio, as in all other States, for the approval of applicants to a profession is to delegate the function by statute to an agency which is directed by a board composed of the members of the profession to be regulated. A potential for controlling the numbers of new members and thereby increase or decrease competition exist. The legislature and the general public look to the good will and intentions of those appointed and basic constitutional guarantees and the legislative scheme which enables Board action to restrict the potential for abuse.

When the Defendant members of the Ohio State Board for medicine met in December 1979, they wished to reinterpret their licensure statute and change their established past practice. The Board's attorney presented a

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"Position paper or licensure" which was adopted with the direction that staff proceed with rules as necessary. The new standard called for restricting approval mandated by the licensure statute to World Health Organization listed schools to mean only those school listed prior to 1970. Schools unlisted would be examined and approved with the schools possibly being required to conduct self studies and subject themselves to on-site inspections. The members of the Board must be charged with knowledge of that the natural consequence of their actions would be to hereafter deny medical licensure to applicants who had graduated from schools unlisted in the 1970 W.H.O directory.

The Ohio legislature had clearly mandated a process in Ohio Law Chapter 119 to be followed before changes in

policies or rules adversely effecting individuals could become valid and be enforced. This clearly expressed law required notice and an opportunity to be given and to be heard before the change became valid. In clear violation of that statutory prohibition the Board members voted to put the new policy restrictions in effect until they directed staff otherwise. The Board members then denied applicants medical licensure solely on their schools non 1970 W.H.O listing notwithstanding their proven compentence in passing the national licensing exam and being licensed to practice medicine in other states, indeed successfully practicing in other states.

Medical Board minutes of March 11, 1981 (page 1527) indicated that Mr. Ray Bumgarner appeared before the committee as council to the medical board and

presented rules which would allow the Board to evaluate Foreign Medical schools. The committee rejected the proposed rules and advised Mr. Bumgarner "The legislature felt that these rules were beyond the intent and authority contained in the present statutes". (Board minutes page 1527).

That the Board was made aware that rules were required in order to have a valid 1970 W.H.O freeze is obvious from a review of Board minutes "Mr. Bumgarner continued that this leaves a major problem with the question of whether that action in the legislature means that the Board can no longer enforce the December, 1979 motion and other motions having to do with policies for foreign schools until such time as other rules are put in place or legislation is passed". (Board minutes page 1527).

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The proposed rules were withdrawn.

Approximately ten months later new rules were again prepared but authorization to include the evaluation of foreign medical schools was not even sought; "because of problems with 4731.3.01 recognition of medical schools' it is being left out of the group of rules to be refiled" (Board minutes October 14, 1981 page 1814).

Further indication of the Boards awareness of their illegal "policy statement" may be found in two legislative efforts initiated by the Board to wit House Bill 1047 Regular session 1979-80 and House Bill 565 in Regular Session 1981-82. Both bills were specifically written to enable the Board to evaluate Foreign medical schools. Despite the Defendants efforts both bills failed to pass.

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The Board made application to Governor Rhodes for emergency rules in order to authorize its 1970 policy and permit it to evaluate foreign medical schools. The Governor rejected the application.

On June 23, 1988 the Medical Board again filed 65 new rules for review of the joint Committee on Agency Rule Review. The Committee approved sixty rules and deleted only the five rules validating the Boards 1970 policy and enabling or authorizing the Board to evaluate foreign medical schools.

Ross University, unlisted in the 1970 W.H.O made a detailed submission for approval in 1982.

Saint George University school of medicine, unlisted in the 1970 W.H.O., made an extensive submission in 1984 which was twice updated at the Boards

request.

Neither schools submission have been considered by the Board despite repeated urging that they do so.

The denial of school approval has been continuous, the refusal to consider their submissions and thus their graduates applying for licensure persist to the date of this petition unaffected by the many decisions of Ohio State Court's directing the board to consider the medical schools without regard to their unlawful policy restrictions.

REASON FOR ALLOWANCE OF THE WRIT

THERE EXIST A CONFLICT BETWEEN THE STANDARD ESTABLISHED BY THIS COURT AND THE SIXTH CIRCUIT, I.E.;

On June 25, 1987 this Court held in Anderson vs. Creighton 483US 635, 639, 97L. Ed. 2523 107 S. Ct. 3034 that for officials to be immune the law "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been held unlawful."

The decision of the Sixth Circuit does not follow the standard above stated in the "In Robinson vs. Bibb, 840 F 2d 349 (6th Cir. 1988) we explained that a question must be

REASON FOR ALLOWANCE OF THE WRIT

THERE IS A CONFLICT BETWEEN THE SIXTH AND NINTH CIRCUIT ON THE STANDARD TO BE USED, I.E.;

decided either by the highest state court in the state where the case arose, by a United States Court of Appeals, or by the Supreme Court in order to be clearly established for purposes of qualified immunity."

The need for clarification of the Anderson standard stated by this Court supra was expressed by the Sixth Circuit in Robinson vs. Bibb 840 F 2d 349, 351 (6th Cir. 1988) "The Supreme Court has failed to clarify whether only its own pronouncements can clearly establish a constitutional right or whether lower Court decisions will operate to the same effect."

The Ninth Circuit in its decision

of April 8, 1988 has an addition and different standard as set forth in Trubble vs. Gardner 860 F 2d 321, 324; "To determine whether a right is clearly established, in the absence of binding precedent, a Court should look at all available decisional law including decisions of State Courts, other Circuits and District Courts...." Ward vs. County of San Diego, 791 F 2d 1329, 1332 (9th Cir. 1986) Cert. denied ____ U.S. _____, 107 S. Ct. 3263, 97L Ed. 2d 762 (1987) An additional factor that may be considered is a determination of the likelihood that the Supreme Court or this Circuit would have reached the same result as Courts which had previously considered the issue! Capoeman vs. Reed, 754 F 2d 1512, 1515 (9th Cir. 1985). Government officials are charged with knowledge of constitutional

developments, including all available decisional law. Gutierrez vs. Municipal Court, 838 F 2d 1031, 1048 (9th Cir. 1988).

THE SIXTH CIRCUIT HAS NOT FOLLOWED THE PRECEDENT ESTABLISHED BY THIS COURT

This Court clearly established a liberty right to the practice of a profession in Schware vs. Board of Bar Exam of State of New Mexico, 353 US 232, 234; "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment "Certainly the practice of law is not a matter of the State's grace."

REASON FOR ALLOWANCE OF THE WRIT

The Sixth Circuit Court ignored this Court's clearly expressed liberty right defined in Schware supra and found no fourteenth Amendment due process violation in the present case.

When Ohio Law Chapter 119 clearly mandated the due process required for change of policy it limited the boards discretion to the policy existing unless the outlined procedure is followed. When the Board attempted to implement their new restrictive change it was struck down. Hyde vs. State Medical Board 33 Ohio App. 3d 309, 311, 515 N.E. 2d 1015, 1017 (1986).

It should be apparent that the unlawfulness of the Boards actions had been clearly established by Hyde as it was not further appealed. As Defendants had the sole option of bringing the case to the highest Court of the State, which

they chose not to do, they now are protected by with qualified immunity due to their failure to have the highest Court Rule. Such a standard is basically unfair as the Defendants can remain as ignorant of the highest Courts opinion as they chose, while continuing to deny Plaintiffs and members of their class licensure. The Sixth Circuit suggested that the policy statements remained the standard until 1986 when a divided Ohio Court of Appeals eschewed the boards construction of the listing provision. Nowhere in the record does it appear that the board changed its policy after it was ruled invalid. The record shows the Board continued the policy and to the date of this Petition schools listed in the 1970 W.H.O directory are approved, schools unlisted are

unapproved. The unlawful deprevation of Plaintiff's rights continued not only after the Hyde case, but after the Anderson case was decided by the Court of Appeals and the Ohio Supreme Court denied the Defendants appeal of February 7, 1990.

THE SIXTH CIRCUIT IS IN CONFLICT WITH THE OHIO SUPREME COURT

The highest Court in the State of Ohio had clearly and repeatedly upheld the need to follow the procedure outlined in Ohio law chapter 119 before the implementation of a rule or policy change. Condee vs. Lindley 12 Ohio St. 30, 90 (1984) McLean Trucking Co. vs. Lindley 70 Ohio 2d 106, 116, 435 NE 2d 414 (1982) Board of Trustees of Ohio State University vs. Department of

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Administrative Services 68 Ohio St. 3d 149, 154, 249 NE 2d 428 (1981).

The Sixth Circuit ignoring the mandatory language of Ohio Law Chapter 119 and the clearly expressed decisions of Ohio Supreme Court invalidating rules or policies failing to follow procedure and the decisions rendered in Hyde and Anderson cases has created a new category which it has called "informal standards" which it had declared exempt from notice and opportunity to be heard by those adversely effected prior to implementation.

In considering what a reasonable person should know a standard that should be set by this Court, would be that when statute itself, by it's terms clearly expresses its intent to any reasonable person it should alleviate the need for any further judical

definition before an individual can be charged with knowledge of the statutes purpose. To determine if a government official is entitled to qualified immunity the Court should begin its inquiry with a careful review of the statute or statutes claimed to be violated. If the wrong should have been apparent from the statute or regulation alone, a judicial determination further establishing unlawfulness should not be required.

That the "informal standard" or policy change included the provision for possible on-site inspection of the applicants foreign medical school by the medical board in the foreign country. Whether the expense of the trip abroad is at applicant or their school expense or the State of Ohio is unstated. The scope of the change becomes apparent on reflection on the details of the policy

statement of December 12, 1979. To hold the Defendant's immune after maintaining a unlawful policy for length of time that Plaintiffs and members of their class have been unlawfully denied a liberty right effectively ends the fundamental purpose of 42 USC 1983.

Respectfully submitted,

By Bernard Ferguson

Bernard Ferguson
7 Essex Drive
Westerly, RI 02891
(401) 596-6662